Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re

Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) From Title II and *Computer Inquiry* Rules With Respect to Broadband Services	)))))	WC Docket No. 06-125

OPPOSITION OF
ALPHEUS COMMUNICATIONS, LP
CAVALIER TELEPHONE, LLC.
DELTACOM, INC.
INTEGRA TELECOM, INC.
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.
MPOWER COMMUNICATIONS CORP.
PAETEC COMMUNICATIONS, INC.
TDS METROCOM, LLC
TELEPACIFIC CORP. D/B/A TELEPACIFIC COMMUNICATIONS

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SUMMARY

The Verizon forbearance petition that was "deemed granted" by the Commission last year provides no guidance for evaluating Qwest's and other BOC "me too" petitions. As explained in the appeal, the Verizon petition was denied, not granted. There was no written decision by the Commission, and decision making by default is not the best approach to establish important regulatory decisions. The Commission may not grant the Qwest Petition as a ministerial act because Section 10 requires a written order justifying any decision.

Qwest fails to provide *any* market analysis. Qwest merely asserts that forbearance is justified because of the competition that it allegedly faces of which the Commission is "well aware." Assuming that the Commission does not deny the Petition, it must conduct an analysis of each stand-alone broadband service rather than sweeping them into one vague category of "broadband."

The Petition should be denied because Qwest retains market power in provision of essentially all broadband services. Recent studies provided by Integra Telecom, Inc. and McLeodUSA Telecommunications Services, Inc., the *GAO Report*, findings by the Department of Justice, and the Commission's *Local Competition Report* confirm that Qwest continues to control access to the vase majority of buildings in its region. This refutes Qwest's claim that it faces significant facilities-based competition that could eliminate its market power. Qwest expects the Commission to uncritically accept its statement that it lacks market power in provision of broadband common carrier transmission services. It would be unlawful for the Commission to grant the Petition on this basis because Section 10 does not permit the

Commission to merely assume that forbearance standards will be met absent enforcement of a regulation or requirement.

The Petition should additionally be denied because Qwest imposes unreasonable terms and conditions of service on the provision of packet switched and OCn level common carrier broadband transmission services. The *GAO Report* found that conditions such as revenue guarantees and requirements to shift business away from independent facilities providers harms competition. Forbearance should be denied so that the Commission may continue to exercise regulatory oversight over terms and conditions of service.

The *Wireline Broadband Order* does not govern consideration of Qwest's Petition because that order dealt with broadband information service, not common carrier transmission services, as that Commission order specifically stated.

Qwest and other BOCs do not need the requested broad relief in order to offer customized services. Other more targeted approaches - such as contract tariffs, separate advanced services affiliates (such as that voluntarily used by AT&T), and the *Fast Packet Order* provide ample opportunity for Qwest and other BOCs to offer customized solutions to customers on a deregulated basis.

Qwest is playing games with respect to the provisions of Title II from which it seeks relief. It fails to identify the provisions for which it seeks forbearance so that it may later claim that any forbearance applies to Section 271 and to Section 251 interconnection and unbundling obligations. The Commission should narrow the scope of relief requested to a narrow range of *services* and not to any obligations that apply to underlying facilities.

Qwest has strong incentives to discriminate against competitors in the provision of access customer locations. It would use "private carriage" to give competitors inferior provisioning and maintenance as well as charge them higher prices.

The Commission may and should address the Qwest and other BOC petitions for broadband forbearance in the pending rulemaking proceeding looking at whether they are dominant in provision of broadband common carrier services. Any rules that the Commission adopts in that proceeding would apply to all BOCs and supersede any relief purportedly "deemed granted" to Verizon.

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Alpheus Communications, LP., Cavalier Telephone, LLC., Deltacom, Inc., Integra Telecom, Inc., McLeodUSA Telecommunications Services, Inc., Mpower Communications Corp., PAETEC Communications, Inc., TDS Metrocom, LLC, and U.S. TelePacific Corp. d/b/a TelePacific Communications file this Opposition to the above-captioned Petition[1] filed by Qwest Corporation requesting that the Commission forbear from application of Title II and *Computer Inquiry* requirements to the same extent that Verizon obtained forbearance when the Commission failed to act on that carrier's petition for forbearance by the statutory deadline.[2]

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1 Pleading Cycle Established for Comments on Qwest Petition for Forbearance Under 47 U.S.C. Section 160(c) From Title II and Computer Inquiry Rules with Respect to Broadband Services, Public Notice, WC Docket No. 06-125, DA 07-3923, released September, 13, 2007.

2 *Verizon Telephone Companies' Petition for Forbearance From Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted By Operation of Law*, News Release, WC Docket No. 04-440, released March 20, 2006.

I. THE VERIZON "DEEMED GRANTED" FORBEARANCE DOES NOT GOVERN, BUT IS SUBJECT TO, THE COMMISSION'S EVALUATION OF PENDING ILEC BROADBAND FORBEARANCE PETITIONS

The Commission should reject Qwest's claim that the earlier Verizon forbearance petition that was "deemed granted" is a mandate that the Commission immediately grant Qwest the same relief.[3] The Verizon petition was denied, not granted, as explained in the pending appeal concerning the Verizon petition.[4] The Verizon forbearance does not establish any precedent or policy because there was no written decision that could provide guidance to inform evaluation of the Qwest or other ILEC petitions pending in this docket. The Verizon forbearance should not provide guidance to future decisions because decision making by default is far from the best approach to establishing programs to govern BOC provision of broadband services.[5]

In fact, assuming that the Commission grants any of the petitions in this docket (which it should not do), the Commission should use this proceeding to examine the forbearance granted to Verizon and clarify its scope. The Commission, when considering what, if any, relief other BOCs are entitled, will *ipso facto* be determining the scope of relief granted to Verizon since the other BOCs request the same relief that was granted to Verizon. By clarifying the scope of what it thinks the Verizon petition encompassed, the Commission may narrowly tailor forbearance for all the BOCs. The Commission should reject Qwest's and other BOCs' request to let the

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3 Petition at 7.

4 *Sprint Nextel Corporation et al. v FCC*, Case No. 06-1111, D.C. Circuit, Brief of Carrier Petitioners, filed February 26, 2007, pp 17-22.

5 *Verizon Telephone Companies' Petition for Forbearance From Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted By Operation of Law*, News Release, WC Docket No. 04-440, released March 20, 2006, Separate Statements of Commissioners Michael J. Copps and Jonathan S. Adelstein.

unlawful forbearance deemed granted to Verizon steer important policy decisions. Instead, the Commission must issue a written decision to justify any grant (or denial) of forbearance to ameliorate the arbitrary and unreasoned lack of decision-making on the Verizon petition.

The Commission may rescind, modify, or clarify the Verizon forbearance in whole or in part. Section 10 of the Act provides for forbearance from application of FCC regulations or provisions of the Act, but does not rescind or repeal those requirements. Even to the extent substantive relief was granted to Verizon by the Commission's inaction, the forborne FCC regulations and statutory provisions remain in effect and may be reapplied when circumstances warrant.[6] The Commission has already determined that an analogous provision of the Act permits this action. Section 204(a)(2)(C)(3) provides that a LEC tariff filed on 7 or 15 days notice shall become effective and be "deemed lawful" if the Commission does not suspend the tariff within those time periods.[7] However, the Commission has determined that it may later find the tariff unlawful notwithstanding that it was previously "deemed lawful" by operation of the statute.[8] Similarly, therefore, the Commission may rescind, modify, or clarify in whole or part a forbearance that was "deemed granted" under Section 10(d).

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6 Qwest concedes that the statute does not prohibit the Commission from re-imposing regulations that were the subject of a previous grant of forbearance under Section 10. *See* Brief of Qwest, Inc., Qwest v. FCC, DC Cir. 05-1450, at p. 24 n. 17 (August 7, 2006).

7 47 U.S.C. Section 204(a)(2)(C)(3).

8 Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, Report and Order, CC Docket No. 96-187, released January 31, 1997, para. 19.

II. THE PETITION MAY NOT BE GRANTED AS A MINISTERIAL ACT

Qwest requests that the Commission should, in light of the Verizon forbearance, grant the petition as a ministerial act.[9] Any such ministerial act would be unlawful. Section 10(c) provides that "the Commission may grant or deny a petition in whole or in part and explain its decision in writing."[10] Rather than some ministerial action, the Commission must provide a written decision that explains how the Petition meets or does not meet the standards for forbearance under Section 10(a).

III. THE PETITION SHOULD BE DENIED FOR FAILURE TO PROVIDE AN ADEQUATE MARKET ANALYSIS

The re-filed Petition, as before, fails to provide *any* market analysis. Qwest provides no factual information of any kind concerning competition; does not define or provide support for the existence of geographic markets where it claims competition exists; and does not define or suggest product markets other than to rely on the generic term "broadband," which the Commission has defined broadly as a service capable of transmitting information at more than 200 Kbps in both directions.[11] Instead, Qwest merely asserts that forbearance is justified in light of "the competitive market in which Qwest competes,"[12] and that the Commission is "well

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9 Qwest Petition at 7.

10 47 U.S.C. Section 160(c).

11 *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54, Fourth Report to Congress, FCC 04-208, (rel. Sep. 9, 2004) ("*Fourth Advanced Services Report*"), p. 10..

12 Petition at 15.

aware" that the broadband market for enterprise customers is competitive.[13] Qwest expects the Commission uncritically to accept its assertion that it lacks market power in provision of stand-alone broadband transmission services as if "broadband" were a magic totem that automatically justifies forbearance.

It would be unlawful for the Commission to grant the Petition on the basis of mere assertions of competition. Under Section 10, the Commission "cannot assume, that absent [the provision or regulation] market conditions or any other factor will adequately ensure that the charges, practices, classifications and services … are just and reasonable and not unjustly or unreasonable discriminatory."[14] The statute requires the Commission to tailor its forbearance findings to specific markets or specific carriers. Section 10 directs the Commission to forbear only "in any or some" of the markets where the petitioner shows the forbearance criteria are met.[15] The statute expects that the petition and the Commission's analysis will be granular and will not make broad sweeping regulatory pronouncements where narrower findings are more appropriate. This approach is consistent with judicial guidance regarding the appropriate geographic market for assessing entry barriers in the local telecommunications market.[16] To assess properly whether a carrier possesses market power, the Commission has found that "the

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13 Petition at 15.

14 *1998 Biennial Regulatory Review of ARMIS Reporting Requirements*, Report and Order, Petition for Forbearance of the Independent Telephone and Telecommunications Alliance, Fifth Report and Order,14 FCC Rcd 11443 ¶ 32 (1999).

15 47 U.S.C. Section 160(a).

16 *USTA v. FCC, 290* F.3d 415, 426 (D.C. Cir. 2002).

proper market aggregates those consumers with similar choices regarding a particular good or service in the same geographic area."[17]

Assuming the Commission does not deny the Petition, it should ensure that its analysis is limited to the appropriate product market. As it has in analyzing carrier petitions for non-dominant regulatory classification, the Commission should analyze the product market for each stand-alone broadband service using substitutable services. For example, the Commission's *Advanced Services Report* makes clear that there are differences in the residential and business market that warrant analysis in separate product markets.[18] Thus, rather than sweep all of Qwest's broadband services (*e.g*., 200 Kbps i up to an OC48) into one product market, the Commission is obligated to consider separately the forbearance petitions for retail business customers and residential customers as well as wholesale services because the services are not substitutable.

Without prejudging in this pleading the appropriate geographic market for any broadband transmission service, the Commission previously has evaluated competition in the market for common carrier transmission facilities on a localized basis. The Commission has a long line of cases analyzing the relevant geographic market for transmission services "as a link between two points." *Unbundled Access to Network Elements*, 20 FCC Rcd 2533, 2582 ¶ 80 (2005) ("*TRRO*"). In the *TRRO*, the Commission found that the relevant market for transport, or the interoffice connections that are part and parcel of the BOC services at issue here, required a

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17 *WorldCom v. F.C.C.*, 238 F. 3d at 461 *citing* NYNEX, 12 FCC Rcd. 19,985 ¶ 54.

18 *See generally Fourth Advanced Services Report*.

"route-by route" analysis. *TRRO* ¶ 79. In the *LEC Classification Order,* 12 FCC Rcd at 15762, 15793, ¶¶ 5, 65 (1997), the Commission defined "the relevant geographic market for interstate, domestic, long distance services as all possible routes that allow for a connection from one particular location to another particular location (*i.e.*, a point-to-point market)." In *Application of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, 12 FCC Rcd 19985, 20016-17, ¶ 54 (1997) ("*Bell Atlantic/NYNEX Merger Order*"), the Commission recognized again that "each point-to-point market constituted a separate geographic market." The *TRRO* accordingly rejected the BOCs' proposed broader market definitions as impermissibly "overbroad," recognizing the "wide variability in market characteristics within an MSA" and that economic conditions "may vary significantly from one part of an MSA to another." *TRRO*, ¶ 82.

Similarly, with respect to last mile loop facilities, the Commission has consistently evaluated competition using a granular and "nuanced" local market analysis. The *TRRO*, for example, found a wire center market as the appropriate geographic market, ¶ 155, rejecting the broader MSA wide approach favored by some BOCs as consisting of "an inappropriate level of abstraction." For similar reasons, the Commission rejected a nationwide loop market, finding "a more nuanced approach" the better course. The Commission maintained this analysis in the *Omaha Forbearance Order*,[19] and the *ACS Anchorage UNE Forbearance Order*.[20] In its recent

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19 *Omaha Order*, 20 FCC Rcd at 19445 ¶ 61.

20 *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, 22 FCC Rcd 1958, (2007).

BOC Merger Orders, the Commission defined the relevant geographic market as "each customer location." *SBC/AT&T Order*, ¶ 57.[21]

The need for a full market power analysis is not obviated by *Earthlink v. FCC*, No. 05-1087, D.C. Circuit, August 15, 2006 in which the court affirmed the Commission's decision to forbear from application of Section 271 unbundling to broadband network elements. Here, the issue is not forbearance from unbundling obligations but whether the broadband market is sufficiently competitive to permit dispensing with common carrier regulation. The Commission may not rationally determine whether competition is sufficient to assure reasonable pricing and other terms and conditions for stand-alone broadband transmission services without assessing whether the BOCs possess market power in the provision of those services. Thus, the Commission must conduct a full market power analysis. *See AT&T Corp. v. FCC*, 236 F. 3d 729 (D.C. Cir. 2001).

In connection with its initial petition, the Bureau specifically asked Qwest and other ILECs to file information concerning competition at the local level.[22] Insofar as Qwest is claiming that the appropriate geographic market is national or its operating region it must demonstrate competition in each and every market within those areas. Although Qwest, unlike AT&T and Verizon, provided some new information, Qwest failed to provide any local market data. It provided only region-wide information, which was not responsive to the Bureau's request. In addition, the Harte-Hanks report provided by Qwest "depicts only surveyed sites at

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21 *See also Bell Atlantic/NYNEX Merger Order*, 12 FCC Rcd at 20016-17 ¶ 54.

22 Letter from Thomas J. Navin to Verizon, Qwest, AT&T, Embarq, and Frontier Communications, WC Docket No. 06-125, August 23, 2007.

which the named carrier is one of several possible carriers providing service to the site."[23] This statement apparently acknowledges that the report only encompasses sites at which competitors are present. If Qwest pre-selected competitive sites, leaving out the majority of sites where Qwest faces no competition, the reported market share data will drastically understate Qwest's market share and inflate the level of competition. Third, the report admits that it is not "statistically accurate."[24] In addition, market share data alone cannot prove that Qwest lacks market power here because the market share data does not distinguish between competition provided by full facilities-based competitors over their own facilities and competitors using Qwest's special access services to reach the customer.[25] Therefore, to the extent relevant to the re-filed Petition, Qwest's response to the Bureau's letter does not provide any probative evidence of competition anywhere in the Qwest region.

Qwest has had ample opportunity to submit a complete and reasoned market analysis and showing of competition for provision of broadband transmission services but has not done so. At this point, the Commission should deny the Petition for lack of record information that could

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23 *Ex Parte* Letter from Melissa Newman, Qwest, to Marlene H. Dortch, FCC, WC Docket No. 06-125, August 31, 2007, Attachment B, p. 1.

24 *Id.*

25 It is likely that Qwest could not show sufficient enterprise market competition whether intramodal or intermodal because it does not exist. As Comcast explains in response to Qwest's UNE Forbearance Petition in Denver, Seattle and Minneapolis, Qwest's claims regarding enterprise market competition from Comcast are "grossly exaggerated," that "Comcast has not, to date, made any significant or sustained entry into the business market and enterprise markets," and "Comcast is only now beginning to build the infrastructure necessary to serve these customers." Comments of Comcast Corp. WC Docket 07-97, at p. 6, filed Aug. 31, 2007.

permit the Commission to make the requisite finding that enforcement of Title II and *Computer Inquiry* obligations is unnecessary to assure reasonable rates and to protect consumers.

IV. QWEST RETAINS MARKET POWER IN THE PROVISION OF BROADBAND IN WHOLESALE AND ENTERPRISE MARKETS

The Petition should be denied because Qwest retains market power in provision of broadband transmission services. In connection with Qwest's pending applications for forbearance from UNE obligations in four MSAs in its region, Integra Telecom, Inc. has recently conducted a survey of multi-tenant office buildings in several cities in which it has customers in the Qwest region, including Minneapolis, Phoenix, and Seattle to ascertain how many independent networks are physically present at these buildings. The results show that in Minneapolis only 4 out of 61 buildings visited were served by competitive fiber; in Phoenix 3 out of 55 buildings were served by competitive fiber; and in Seattle 12 out of 217 buildings had competitive fiber. This survey shows that there are remarkably few commercial buildings in these MSAs that have competitive facilities, and that nearly all of the providers at the buildings surveyed were dependent on ILEC facilities to provide service.

McLeodUSA has recently informed the Commission of a study by GeoResults of the number of commercial buildings in Omaha that have competitive fiber.[26] This study shows that only a tiny percentage of buildings in Omaha have competitive fiber including fiber provided by cable.

[26] Reply to Opposition, McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223, filed September 13, 2007, pp 1-3..

Integra's and McLeodUSA's surveys are consistent with, and confirm, analyses and data of the Commission and the GAO. In *Local Competition: Status as of June 30, 2006*, the Commission presented its most up to date summary statistics on the state of competition in local telephone markets across the United States.[27] Based on publicly available statewide data, the *Local Competition Report* shows that ILECs such as Qwest provide an overwhelming percentage of the residential and business lines in each market. In the residential market, ILECs control 71% of the lines in Arizona, 91% in Colorado, 85% in Minnesota, and 95% in Washington.[28] ILECs also control 68% of the business lines in Arizona, 86% in Colorado, 68% in Minnesota, and 69% in Washington.[29]

Similarly, after examining the state of facilities-based competition in sixteen major metropolitan areas, including the Seattle, Phoenix, and Minneapolis MSAs, the GAO reached the conclusion that on average competitive facilities are present in "less than 6 percent of buildings with at least a DS-1 level of demand" and approximately 15 percent of buildings with a DS-3 level of demand.[30] In the Phoenix MSA the GAO found that only 3.7% of DS-1 buildings and 11% of DS-3 buildings are lit with competitive fiber.[31] Similarly, in the Seattle and Minneapolis

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27 *Local Telephone Competition: Status as of June 30, 2006*, Industry Analysis and Technology Division, Wireline Competition Bureau (January 2007) ("*Local Competition Report June 30, 2006 Status*").

28 *Id*., at Tables 10-12.

29 *Id*.

30 U.S. GENERAL ACCOUNTABILITY OFFICE, REPORT TO THE TO THE CHAIRMAN., COMMITTEE ON GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES - TELECOMMUNICATIONS, "FCC NEEDS TO IMPROVE ITS ABILITY TO MONITOR AND DETERMINE THE EXTENT OF COMPETITION IN DEDICATED ACCESS SERVICES (November 2006)("*GAO Report*") at 12.

31 *Id.* at 20.

MSAs only 3.8% and 5.7%, respectively, of DS-1 buildings are lit with competitive fiber.[32]The GAO also found that rates for special access services have generally increased where they are not regulated.[33] This is yet another indicator that facilities-based competition is not yet robust enough to constrain prices in the MSAs in the Qwest region that were the subject to the GAO study.

MCI has explained that there is no basis for a finding that "incumbent local exchange carriers are non-dominant with respect to interstate access services, such as frame relay and ATM, that are generally provided to larger business customers."[34] The Ad Hoc Telecommunications User Group has affirmed that its members have "no competitive alternatives to ILEC services to meet their broadband business service requirements in the overwhelming majority of their service locations."[35]

Although the *Omaha Order* erred insofar as it granted Qwest's request for forbearance from UNE obligations in Omaha, Nebraska, the Commission correctly declined to find Qwest nondominant in provision of high capacity loops and transport even though it found that Cox

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32 The numbers for DS-3 buildings are only slightly better, with 15% in Seattle and 21% in Minneapolis lit by competitive fiber.

33 *See* GAO Report at 12-13.

34 Letter to Marlene H. Dortch from Ruth Milkman, Counsel to MCI, Inc., CC Docket No. 01-337, filed May 8, 2003.

35 Comments of Ad Hoc Telecommunications Users Group, CC Docket No. 01-337, filed March 1, 2002 at 14.

was a significant intermodal competitor.[36] In that decision, the Commission also correctly found that Qwest was the only wholesale provider in Omaha.[37]

The foregoing information refutes Qwest's claim here that it faces significant facilities-based competition for broadband services that could eliminate its market power. OCn level services require last mile fiber, and moreover, require it on both ends of the circuit. Since only a small percentage of commercial buildings in Qwest territory have CLEC fiber, it necessarily follows that only a small percentage of those buildings have competitive fiber-based services, such as OCn and Ethernet, that do not rely on BOC inputs such as special access. Accordingly, it is impossible that there could be sufficient competition to assure that the prices and terms and conditions of optical OCn level and other fiber-dependent (such as Ethernet) services remain reasonable, regardless of the "theoretical " possibility found in the *TRO* that CLECs can build OCn loops.[38]

In order to permit private carriage status for OCn level services and other fiber-dependent services, the Commission would have to find that virtually all of the buildings that have BOC fiber also have competitive fiber, *i.e.* non-BOC-owned fiber, built to them. Without such a

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36 *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. Section 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 04-223, FCC 05-170, released December 2, 2005 ("*Omaha Order*") ¶ 51.

37 *Omaha Order* ¶ 67.

38 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 F.C.C.R. 16978 (2003), *corrected by* Errata, 18 F.C.C.R. 19020 (2003), *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied sub nom. Nat'l Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313 (2004)(*"TRO"),* para. 315.

finding regarding the existence of competitive fiber, there is no record of real competition that would justify the extraordinary remedy of granting private carriage status to services with no real competition.

The Commission must be mindful that the "competition" upon which the Petition purports to rely, but never specifically documents, is based on competitors that purchase bottleneck transmission inputs from the BOC special access tariffs. As the CIBC World Markets report attached to Verizon's August 29, 2007 *Ex Parte* explains, "one of the keys to the recent success of the CLEC business model has been the ability to efficiently utilize incumbents' local loops with disruptive technologies."[39] The CIBC report explains that facilities based competitors cannot deploy facilities using the build-it-and-customers-will-come-approach, which has been discredited. Rather as CIBC states, it prefers the "smart build approach," where "the CLEC captures its customers first and then fills in the needed assets in a cost-effective way" where it is economically feasible to do so.[40]

Notably the CIBC Report acknowledges the cold reality this Commission must face: "the one piece of regulation that is still critical in an IP world is competitor access to the incumbents' last mile infrastructure."[41] The fact that a carrier connects Ethernet equipment to a fiber transmission facility and carries Ethernet traffic over that facility does not alter the underlying economics of deploying that fiber facility. The barriers to economic deployment of transport and

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39 *See Ex Parte* Letter from Dee May, Verizon to Marlene H. Dortch, FCC, Attachment at p. 4.

40 *Id*. at p. 7.

41 *Id*. at p. 13.

loop facilities, as set forth in the *TRO* and *TRRO,* are agnostic as to the protocol to be used on the transmission facility.

Accordingly, the Commission may not forbear as requested in either the wholesale or retail markets with respect to any of the requested broadband transmission services.[42]

V. QWEST IMPOSES UNREASONABLE TERMS AND CONDITIONS

The Commission should not grant forbearance from Title II for the additional reason that Qwest and other BOCs impose unreasonable terms and conditions on their packet-switched and OCn level services. The Commission should take note of the concerns expressed in other proceedings that BOCs exercise their control over last mile connections to impose anticompetitive terms and conditions.[43] The GAO has found that conditions such as "revenue guarantees, requirements for shifting business away from competitors, and severe termination penalties" "inhibit choosing competitive alternatives because the customer does not receive the applicable discount, credit, or incentive if the revenue targets are not met and additional penalties may also apply."[44] As the GAO concluded, "[u]nless a competitor can meet the customer's entire demand, the customer has an incentive to stay with the incumbent and to purchase additional circuits from the incumbent, rather than switch to a competitor or purchase a portion of their demand from a competitor—even if the competitor is less expensive."[45]

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42 *See also* Time Warner Telecom, Inc. *ex parte*, WC Docket No. 066-74, filed August 8, 2006, p. 16.

43 Comments of ATX Communications Inc., *et al*, WC Docket No. 05-25, filed August 8, 2007, p. 51.

44 GAO Report at 30.

45 GAO Report at 30.

The Commission should deny the Petition in order to exercise continued regulatory oversight over, and to proscribe, these unreasonable terms and conditions. Assuming the Commission were to grant the Petition to any extent, it should prohibit such unreasonable terms and conditions as a condition of forbearance.

VI. THE WIRELINE BROADBAND ORDER DOES NOT GOVERN

Contrary to Qwest's claim, the *Wireline Broadband Order* does not provide any guidance in evaluating the instant petitions because Qwest requests forbearance for stand-alone broadband services. In the *Wireline Broadband Order*, the Commission stated that:

> [P]roviders of wireline broadband Internet access service offer subscribers the ability to run a variety of applications that fit under the characteristics stated in the information service definition. These characteristics distinguish wireline broadband Internet access service from other wireline broadband services, such as stand-alone ATM service, frame relay, gigabit Ethernet service, and other high capacity special access services, that carriers and end users have traditionally used for basic transmission purposes. That is, these services lack the key characteristics of wireline broadband Internet access service – they do not inextricably intertwine transmission with information-processing capabilities. Because carriers and end users typically use these services for basic transmission purposes, these services are telecommunications services under the statutory definitions. These broadband telecommunications services remain subject to current Title II requirements.[46]

The *Wireline Broadband Order* acknowledged that the scope of that proceeding does not encompass the regulatory status of stand-alone broadband services: "Consistent with the scope of the *Wireline Broadband Proceeding*, we restrict our decisions in this Order to only wireline

[46] *Wireline Broadband Order*, para. 9 (footnotes omitted).

broadband Internet access services and those wireline broadband technologies that have been utilized for such Internet access services." [47] The Commission observed that the issue of "how Title II regulation applies to broadband service provided as telecommunications service" is the subject of a separate proceeding, the *NonDominance Proceeding*.[48] Accordingly, the stand-alone broadband transmission services that are the subject of the instant petitions were not addressed in any respect in the *Wireline Broadband Order*.

In addition to not being used or offered in connection with Internet access service, the ATM, frame relay, and Gigabit Ethernet services for which Qwest and other ILECs seek regulatory relief are not new, innovative broadband services of the type that the Commission has sought to encourage through "a lighter regulatory treatment..."[49] These are stand-alone transmission services that have been deployed on a widespread basis in the public telephone network for many years. Although some of these services are increasing in commercial importance, such as Ethernet, this increased importance will only magnify Qwest's and other BOCs' incentives to discriminate against competitors, rather than justify deregulation of it. Other forms of stand-alone broadband transmission, such as ATM and frame relay, may have less commercial importance in the future. Nevertheless, the approach of the *Wireline Broadband Order* also fails to apply to them. Further, of course, the intent to apply a "lighter regulatory

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47 *Wireline Broadband Order*, para. 11 (footnotes omitted).

48 *NPRM* para. 8; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-360, released December 20, 2001 ("*NonDominance Proceeding*").

49 Verizon Petition at 2.

touch" to genuinely new broadband services and investment has no validity or application to such legacy services.

Accordingly, the *Wireline Broadband Order* provides no guidance for evaluation of the instant Petition.

VII. QWEST MAY OFFER CUSTOMIZED SERVICES WITHOUT FORBEARANCE

Contrary to Qwest's argument that that it needs Title I treatment for stand-alone broadband transmission services in order to be able to offer innovative, customized services to users,[50] Qwest is equally able as other BOCs to take advantage of any of the existing options for offering innovative, stand-alone broadband services on a customized basis that are already available to them.

For example, BOCs have offered services through contract tariffs for many years.[51] These are individually negotiated agreements with customers that are designed to meet the customers' specialized needs.

AT&T offers broadband services through its unregulated affiliate SBC-ASI, Inc. The Commission has forborne from application of tariffing rules in connection with then-SBC's provision of advanced services through a separate affiliate.[52] The Commission in the *Fast Packet Order* granted Verizon a waiver that provides Verizon the best of all possible worlds. It permitted Verizon to keep its stand-alone broadband services outside of price caps without

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50 Qwest Petition at 12.

51 *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, 14 FCC Rcd 14221 (1999).

52 *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Memorandum Opinion and Order, 17 FCC Rcd 27000 (2002).

utilizing a separate affiliate, while at the same time permitting Verizon to exercise pricing flexibility for these services in markets in which it qualifies for pricing flexibility.[53] BellSouth has chosen to include packet switched services within price caps and is able to offer those services pursuant to contract tariffs wherever it has qualified for pricing flexibility.[54]

Therefore, Qwest and other BOCs are already able to offer individually tailored services to customers without the requested forbearance.

Qwest's claim that dominant carrier regulation of its broadband services is burdensome cannot justify forbearance. First, dominant carrier regulation is optional. If Qwest wants to avoid this regulation it may provide services through a separate affiliate, as AT&T has chosen to do. Moreover, since Qwest's wholesale broadband services face very little competition, and its CLEC and IXC customers cannot easily switch back and forth between providers for the vast majority of locations, short delays in tariff effective dates have no material effect on a BOC's ability to "compete" in the wholesale market. Entry and exit regulation is essentially a non-issue since it is not likely that Qwest or any BOCs will be either entering or exiting markets in a way that would trigger this regulation at the federal level.

However, even if dominant carrier regulation were burdensome and BOCs could not already offer customized arrangements, the Commission could effectively address Qwest's concerns by streamlining some common carrier regulation such as tariffing. This could reduce or eliminate the minimal costs and burdens of tariffing while permitting BOCs to continue to

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53 *Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services*, WC Docket No. 04-246, FCC 05-171, released October 14, 2005 ("*Fast Packet Order")*, para. 8.

54 *See Fast Packet Order*, para. 7.

make individualized customer offerings. There is simply no need to forbear from all common carrier regulation under Title II because of Qwest's perceived but unfounded concerns with certain aspects of dominant carrier tariff regulation. A more limited forbearance would preserve statutory safeguards that will help prevent unreasonable discrimination by BOCs in provision of services over bottleneck facilities.

Accordingly, assuming some relief is warranted, which CLECs do not believe is the case, the Commission may fully address Qwest and other BOC concerns by a limited forbearance from some tariffing or other obligations.

VIII. THE REQUESTED RELIEF IS FOR "SERVICES" AND ONLY FROM PART I OF TITLE II

Qwest is playing games with respect to the provisions of Title II from which it seeks relief. The Petition fails to enumerate any specific sections of that title, deliberately leaving vague the exact a relief it seeks so that, if the Petitions are granted to any extent, it can later interpret the forbearance to encompass important Title II obligations, such as those imposed in Section 271, or even Section 251.

Assuming it does not deny the Petition, the Commission should define the specific scope of relief requested. The Petition claims that its seeks relief only for certain types of "services," *i.e.* packet-switched (other than traditional TDM) services capable of 200 kbps in each direction, and non-TDM optical networking, optical hubbing, and optical transmission services.[55] The Commission should, therefore, clarify that the Petition seeks relief only from obligations

[55] Qwest additionally requests that the Commission forbear with respect to Metro Private Line Service. Qwest Petition at Attachment A.

applicable to these specific "services" and not from obligations that apply to the underlying networks or facilities on which these services ride, such as, for example, Section 222 concerning customer privacy, or Section 224 concerning pole attachments. The Commission should clarify that the Petition does not seek forbearance with respect to provision of any facilities. Further, because the services in question are provided to enterprise customers, the Commission should clarify that the Petition does not seek forbearance with respect to any mass market services.

With respect to services within the scope of the petitions, Qwest requests forbearance from application of Title II common-carriage regulation. Title II contains three Parts. Part I, Common Carrier Regulation, is comprised of Sections 201-231. Part II, Development of Competitive Markets, is comprised of Sections 251-261. Part III, Special Provisions Concerning Bell Operating Companies, is comprised of Sections 271-276. The Commission should construe the Petitions as seeking relief only from Part I of Title II -- Common Carrier Regulation, Sections 201-231.

As discussed in this Opposition, however, Qwest is not entitled to even this relief.

IX. QWEST WOULD USE PRIVATE CARRIAGE TO DISCRIMINATE AGAINST COMPETITORS

A. Forbearance Would Facilitate Discrimination

Qwest seeks the ability to impose unreasonable terms and conditions of service provided to competitors. Although Qwest and other BOCs make the false claim that they need forbearance in order to provide innovative, customized products to their retail customers, they make no such claim with respect to provision of wholesale services to their competitors. In fact, Qwest has strong incentives not to provide customized arrangements or products to its

competitors that would help them compete against Qwest. As recently explained to the Commission, if a competitor that wishes to provide an innovative service needs a special access arrangement from the BOC, the BOC can increase its profits by refusing to provide it.[56] In addressing ILECs' ability to exercise market power in the broadband market, the Commission found that because ILECs "compete with other providers of advanced services they have an incentive to discriminate against companies that depend on them for evolving types of interconnection and access arrangements necessary to provide new service to consumers."[57] Therefore, whatever merits private carriage may have in terms of the BOCs' own retail customers, it has no validity with respect to the BOCs' provision of essential services to competitors. In the wholesale market, private carriage is merely permission from the Commission to impede competition.

In addition, in the wholesale market, cross-subsidization remains a very real and readily viable strategy for Qwest and other BOCs to thwart competition. BOCs' dominance in the provision of wholesale transmission services would enable them via private carriage to consign independent IXCs and CLECs to inferior provisioning and maintenance, as well as charge them unreasonable prices, all while escaping regulatory oversight.

The BOCs' current ability to impede competition from CLECs would be enhanced if forbearance is granted to any extent because of the broadband unbundling relief adopted by the

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56 Declaration of Stan M. Besen and Bridger Mitchell, p. 13, attached to Time Warner Telecom, Inc. Pex parte, WC Docket No. 06-74, filed August 8, 2006.

57 *In re Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee*, CC Docket No. 98-141, Memorandum and Opinion and Order, October 8, 1999 ("*SBC/Ameritech Merger Order"),* ¶ 202.

Commission in the *Triennial Review Order* and the *Broadband 271 Forbearance Order*. By precluding CLEC access to BOC broadband UNEs to serve the mass market, the Commission has seriously impeded the ability of CLECs to provide IP-enabled services to that market. Further, as found by the Commission, CLECs are impaired in their ability to serve the broadband market because CLECs cannot realistically construct their own loops in most cases.[58] In light of these practical difficulties and unbundling limitations, CLECs' broadband services will be particularly vulnerable to BOC efforts to favor their own broadband operations while potentially denying access, or offering it to CLECs on less favorable terms than the BOC provides to itself.

The Commission should deny the requested forbearance for the single reason that private carriage would facilitate BOCs' ability to act on its incentive to discriminate against competitors.

B. Qwest Has Strong Incentives to Discriminate

Qwest and other BOCs have especially strong incentives to discriminate against CLECs as CLECs attempt to move into the provisioning of innovative packet-switched, VoIP, and IP-enabled services. CLEC VoIP service will compete with BOCs' existing local and long-distance offerings, and will also compete with future BOC VoIP services. The number of incumbent LEC circuit-switched access lines has been in decline.[59] The market for VoIP services has grown significantly from 2003 through 2Q 2006. VoIP subscribership now exceeds 6.9 million customers,[60] and is expected to grow to 18 million subscribers by 2009.[61] While

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[58] *TRO* ¶ 248. ("we find that requesting carriers are generally impaired on a national basis without unbundled access to an incumbent LEC's local loops, whether they seek to provide narrowband or broadband, or both.")

CLEC VoIP services have so far not been a major cause of ILEC line losses, BOCs have strong incentives to thwart provision of CLEC VoIP by denying or degrading access to competing VoIP services.

Even if some packet-switched services do not compete with traditional services, incumbents would have strong incentives to disadvantage competitors in the race to develop and provide the new IP-enabled services, such as video IP. These new markets are a major market opportunity, which BOCs would like to deny to competitors.

The Qwest and other BOC petitions to eliminate Title II common carriage obligations are an attempt to open another front in efforts to limit consumer choice. BOCs have elsewhere explained that "[c]losing the market to a competitor not only unfairly punishes that competitor, but also punishes consumers because it limits their choice and thus increases price and delays availability."[62] Yet the Qwest Petition would strengthen its hand to attempt exactly that result. A grant of the petition would give free rein to Qwest's ability to harm competitors by permitting it to establish special relationships with its own IP-enabled operations, deny them to independent providers or even to deny access altogether to alternative providers.

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59 *See, e.g., Trends in Telephone Service*, Industry Analysis and Technology Division, Wireline Competition Bureau (rel. August 7, 2003) at Table 7.1.

60 *See* "VoIP Central, "US VoIP Subscribers' Base Grows 21 Percent in Q2," August 11, 2006, http://www.voipcentral.org/entry/us-voip-subscribers-base-grows-to-21-percent-inq2/; Merrill Lynch, *Everything Over IP: VoIP—and Beyond*, at 20 (March 12, 2004) ("*Everything Over IP*").

61 Telecommunications Industry Association, "Number of VoIP subscribers more than Triples in 2005 to 4.2 Million; Expected to Grow to 18 Million by 2009," http://www.tiaonline.org/business/media/press_releases/2006/PR06-19.cfm.

62 *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Comments of BellSouth Corporation, (April 8, 2003) at 46 ("Closing the market to a competitor not only unfairly punishes that competitor, but also punishes consumers because it limits their choice and thus increases price and delays availability.")

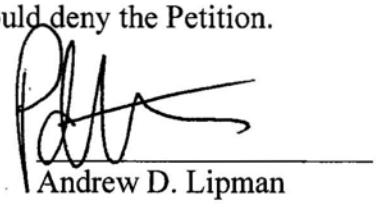
X. THE COMMISSION SHOULD PROCEED BY RULEMAKING

The Commission may and should address Qwest and other ILEC requests for deregulatory treatment of packet switched and OCn level broadband transmission services in the pending rulemaking proceeding that the Commission initiated for that purpose, [63] or in the pending special access proceeding. There, the Commission may determine the appropriate geographic market as well as the appropriate level of evidentiary support without setting harmful precedent in the consideration of future BOC forbearance petitions. Also, the rules that the Commission adopts in such a proceeding would apply prospectively to all BOCs, including Verizon. Those rules would supersede the relief purportedly "deemed granted" to Verizon in March of 2006. Thus, under this suggested approach, rules for the BOC provision of so-called "broadband" common carrier transmission services would apply uniformly to all BOCs going forward.

63 *NonDominance Proceeding*, n. 48, *supra*.

XI. CONCLUSION

For all these reasons, the Commission should deny the Petition.



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